

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

Case No. 00-80318-01

D-01 GERALD BASS,

Defendant.

HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

**MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT’S
MOTION TO SUPPRESS [86-1] AND MOTION TO SUPPRESS FRUITS
OF THE ILLEGAL SEIZURE [86-2]¹**

I. INTRODUCTION

On August 8, 2000, defendant Gerald Bass filed a motion to suppress evidence seized from his hotel room during a warrantless search of a Chicago Marriot Residence Suites Hotel on December 4, 1998. An evidentiary hearing was had on November 7, 2000.

¹Law clerk Carlos Bermudez provided quality research assistance.

Gerald Bass contends that the evidence seized by the police should be excluded, because the search was conducted without a search warrant, without probable cause, without consent, and there were no exigent circumstances to validate the search. The government contends that while the police lacked a warrant, probable cause, and exigent circumstance, the search and seizure was still proper because: 1) Bass had no reasonable expectation of privacy in the hotel room; 2) the officers' reliance on the consent of hotel staff was objectively reasonable; 3) Bass's silence prior to police entrance into the room represented his implied consent to the search; 4) Bass abandoned any privacy rights he may have had in the duffle bag; and 5) the bag would have been inevitably discovered and turned into the police. Based on the evidence presented, the Court GRANTS defendant's motion to suppress evidence found pursuant to the warrantless, consentless search.

II. FACTS

On December 3, 1998, Gerald Bass and at least one other man checked into a Chicago hotel under the name "Robert Brusco." Prior to Mr. Bass checking into the hotel, a valet observed a firearm and what he believed to be drugs inside of Bass's truck. (Tr. at 13) The valet notified management. (Tr. at 13). Kenneth Bernstein, the hotel manager that evening, directed the valet to order Mr. Bass to take any drugs and weapons out of the hotel immediately. (Tr. 19). Upon the discovery of

the gun, the police were not notified immediately, nor did the hotel evict Mr. Bass. (Tr. at 53). Mr. Bass and Deandre Williams left for the evening. Later, the night security was informed of the incident, and he contacted the Chicago police department. (Tr. at 56; 58). The police came to the hotel, set up surveillance, and waited for the men to return. (Tr. at 60)

At approximately 2:45 a.m., on December 4, 1998, the two hotel guests returned to the hotel and began towards their room. The police conducted a felony stop on Bass and Deandre Williams. (Tr. at 80). Bass and Williams were ordered out of their vehicle at gunpoint. (Tr. at 81). The police recovered a .38 caliber revolver. (Tr. at 81). Consequently, Bass was arrested for carrying a concealed weapon. (Tr. at 82). Williams was arrested for creating a disturbance. (Tr. at 82). Both men were “loud and boisterous” upon being arrested, and they objected to the arrest. (Tr. 132).

Although they lacked a search warrant, the police decided to search the room rented by Bass . When the Court questioned Officer Kennedy why a search warrant was not obtained, he responded that there was no probable cause to search the room. (Tr. at 95).

The police, accompanied by hotel staff and Mr. Bass, went to the room and searched the premises. (Tr. at 25-26; 61-63; 83-85; 111-113; and 135). There are

three conflicting accounts of what transpired between the arrest and the search of the room: 1) Sgt. Jenkins' account; 2) the ambiguous accounts of the government's other witnesses; and 3) Mr. Bass's account.

Sergeant Jenkins testified that the police went to Bass's room to ensure that the room was secure at the request of hotel staff, and because Bass had property there. (Tr. 108). Jenkins indicated that Bass made the "spontaneous statements" that he did not want to go upstairs, and that he had no interest in the hotel room. (Tr. at 109; and 111). According to Jenkins, these statements were made by Bass without any questions being posed by the police. (Tr. at 111). Jenkins testified that once in the room, Officer Kennedy picked up the duffle bag, and Mr. Bass said: "That's not my bag." (Tr. at 114). Officer Kennedy did not testify that Bass made that statement. Jenkins was the only officer, of the four Chicago police in the room, who made a police report. The police report does not indicate that Mr. Bass spontaneously disavowed an interest in the hotel room. (Tr. at 120). Mr. Bass never signed an acknowledgment that he had no interest in the room. (Tr. at 121). There is no evidence corroborating Jenkins's testimony that Bass disavowed any interest in the room. (Tr. at 121). This is particularly troubling considering that Jenkins testified that seven people went to Bass's room.

None of the other government witnesses were able to testify that Bass

disclaimed his interest in the room or in the duffle bag. Officer Chris Kennedy, who testified that he was the head of the Chicago police unit dispatched to Bass's hotel room, indicated that he did not know if consent to search the room was given. (Tr. at 83). When questioned whether either of the guests were asked for consent, Kennedy responded: "I don't recall that." (Tr. at 83). During cross examination, Kennedy admitted that there were no documents indicating that Bass consented to the search, or that he waived his right to refuse a search. (Tr. at 99). Anthony Ostrowski, the hotel's security guard, testified that he did not recall any conversation that he had with either Bass or Williams. (Tr. at 62). Ostrowski testified that he did not make a report of the incident, and neither of the suspects gave permission to search the room in his presence. (Tr. at 68; 69). Finally, Kenneth Bernstein testified that he never received consent to tell the police in which room Bass was staying despite a strong hotel policy discouraging the release of such information. (Tr. at 37). Mr. Bernstein could not recall whether the police obtained consent from Bass, but he testified that he did not receive such consent. (Tr. at 46). None of the officers present indicated to Mr. Bernstein that they received Bass's permission to enter his room. (Tr. at 48).

Based on the testimony of Bernstein, Ostrowski, and Kennedy, there is no support that Bass ever consented to the search of his room. In fact, the testimony

of Bernstein and Ostrowski indicate that they were uncertain whether Bass accompanied them to the room. Bernstein testified that he did not know if Bass went up to the room with the police. (Tr. at 25; 48). Ostrowski testified that he could not remember whether Bass or Williams accompanied the police to the room. (Tr. at 62). None of the witnesses testified that Bass was silent during the search.

The final version of the events derives from Mr. Bass's testimony. Bass directly contradicted Officer Jenkins's uncorroborated testimony. Bass stated that Jenkins asked him for consent to search the hotel room, and Bass denied the request. (Tr. at 133). Bass testified that he never disavowed any interest in the hotel room, or the duffle bag. (Tr. at 134). Finally, Bass contends that he never gave permission to search his room. (Tr. at 134).

The police searched Mr. Bass's room but they did not find any dangerous weapons, drugs, or any other individuals. (Tr. at 85). The police found a duffle bag which they confiscated. The police left behind clothes that belonged to the defendant. (Tr. at 86).

The hotel manager, Mr. Bernstein testified that he did not inform Mr. Bass that he was evicted from the room. (Tr. at 54). Mr. Bernstein never testified that he told the police that Mr. Bass was evicted. The hotel paperwork indicated that Bass was checked out at 7:08 a.m., on December 4, 1998. (Govt. Ex. 4). The paperwork

was done hours after the search of Mr. Bass's room.

III. STATEMENT OF ISSUES

The issues presented by the government are: 1) whether Bass was evicted from the hotel; 2) whether the officers' reliance on the consent given by the hotel staff to search the room was reasonable; 3) whether Bass was silent when the police searched his room; 4) whether Bass abandoned his privacy rights in the duffle bag; and 5) whether the bag would have inevitably been discovered and turned over to the police.

This Court finds that Mr. Bass had a privacy interest in the hotel room which he never waived; he never consented to a search; the police reliance on the hotel staff's consent was not objectively reasonable; and the duffle bag was not inevitably discoverable. Because Bass had an uninterrupted expectation of privacy in the hotel room, the police search of Bass's room should be analyzed under a traditional Fourth Amendment warrantless search analysis. Under this framework, at issue is whether exigent circumstance and probable cause existed.

IV. DISCUSSION

The government did not justify its failure to obtain a warrant to search Bass's hotel room. The search of the room was without a warrant, without exigent circumstance, and without probable cause. Mr. Bass's Fourth Amendment rights

were never waived and his hotel room tenure was not terminated until after the illegal search and seizure. The contents of the duffle bag would not have been inevitably discovered. Thus, defendant's motion to suppress evidence is granted.

A. Bass's Expectation of Privacy

Bass had a reasonable expectation of privacy, because he was not evicted until hours after the warrantless search of his room. The government argued that defendant had no reasonable expectation of privacy because the rental was terminated. The government bases its conclusions on two arguments: 1) in their brief the government argued that Bass's lease was terminated when the hotel contacted the police pursuant to Chapter 4-208 of the Municipal Code of Chicago, Illinois; and 2) in oral arguments the government argued that the manager of the hotel evicted Mr. Bass upon his arrest, although he did not inform Mr. Bass or the police. (Govt Supp. Brief at 3).

The government's argument based on Chapter 4-208 of the Municipal Code of Chicago, Illinois is overly broad. This section of the code sanctions innkeepers for permitting illegal activity to take place on hotel grounds. The government contends that the hotel staff complied with the duties of the code and contacted the police. By contacting the police pursuant to this code, Bass's rental of the room was constructively terminated. This argument fails on two grounds. First, the

relevant part of the Chicago municipal code makes a distinction between informing the police and terminating the rental relationship. The Code states in relevant part:

However, no licensee shall be punished for maintaining a public disorder if said licensee notifies the police that he suspects that the aforementioned conduct is occurring on his premises **and/or** terminates the letting of the room or rooms immediately upon learning that the aforesaid conduct is occurring...

4-208-080 PUBLIC DISORDER, Municipal Code of Chicago, IL (emphasis added).

The code exempts a hotel from punishment if it either contacts the police, or terminates the letting of the room. By the terms of the Code, contacting the police is a distinct act from terminating the rental relationship. Because these are separate acts according to the municipal code, the hotel did not evict Mr. Bass when it contacted the police.

Second, the government's contention fails, because in fact, the hotel did not terminate the lease upon notice that Mr. Bass had a gun. According to the government's own articulation of the facts, a hotel employee witnessed a gun and informed management. "When the manager learned later what the valet had seen, Bass was told to take any drugs and weapons out of the hotel immediately." (Govt's Brief at 2). Management did not evict Mr. Bass, or contact the police as required by the Code. The police were contacted later by night security. Based on this conclusion of facts, Bass's rental of the room was never terminated by the

Code.

The government further argues that this situation is similar to the one in United States v. Allen, 106 F.3d 695 (6th Cir.). In Allen, the Sixth Circuit affirmed the district court's decision to deny the suppression of evidence seized by police, who walked through the room without a warrant, and found marijuana. The defendant, in Allen, checked into a motel and paid cash in advance for his room. After charging telephone calls to the room exceeding the cash advance left with the front desk, motel staff attempted to contact the defendant. The hotel did not receive a response. This prompted the employee to go inside of the room where he witnessed marijuana. Immediately, he bolted the defendant out of the room and contacted the police. After surveying the room, the police waited and eventually arrested the defendant. The police ultimately seized the evidence based on a warrant obtained pursuant to their account of the initial walk through of the room. The district court denied the defendant's motion to suppress the evidence, and the Sixth Circuit affirmed.

The present case is fundamentally distinguishable from Allen. Allen was evicted when he was locked out of his room. Presumably, Mr. Allen was locked out for drugs and for failing to respond to notice by the motel that he owed money. In contrast, Mr. Bass paid the hotel in full for his room, and at no point did he owe

the hotel for services rendered. Mr. Bass was never locked out of his room, nor was he told that he was evicted. Unlike in Allen where a hotel employee viewed contraband in the defendant's hotel room, nobody witnessed any contraband in Bass's room. As Officer Kennedy testified, there was no probable cause to search the room because the contraband was viewed in the car not in the room. (Tr. at 95). The cases are also distinguishable because Allen was locked out of his room and functionally evicted as soon as contraband was discovered; Bass was not evicted when contraband was witnessed in his vehicle. He was evicted the following morning. Finally, the police in Allen obtained a warrant to seize the contraband. No warrant issued in this case.

The government also claims that Mr. Bass was evicted when he was arrested. (Govt. Supp. Brief at 3). Kenneth Bernstein the hotel manager testified that "...[Mr. Bass] was a *persona non grata* at the hotel, but he was not actually checked out of the hotel." (Tr. at 54). The government also points to Bernstein's testimony that "[if Bass and his companions] posed a security risk to the other guests of the hotel, I have a right to evict them." (Tr. at 52). However, Mr. Bernstein did not inform Mr. Bass that he was evicted. (Tr. at 54). He did not testify that he informed the police that Mr. Bass was evicted. Finally, he did not do the necessary paper work to evict Mr. Bass. That was not done until hours after the search of the room.

(Govt Ex. 4). In fact, when the hotel manager was asked if Mr. Bass was still officially a guest of the hotel at the time of the arrest, he answered: “Technically, yes. Although once he had been arrested, we would have evicted him.” (Tr. at 35). The hotel manager admitted that there was no hotel policy evicting a person upon arrest (Tr. at 35), and if a guest was arrested “down the street from the hotel,” he would not be evicted. (Tr. at 53).

The rental relationship between Bass and the hotel was not terminated as a result of the hotel’s compliance with the Chicago municipal code, or any independent act. Thus, the government has failed to point to any act that extinguished Mr. Bass’s privacy interest in his hotel room.

B. Police Reasonable Reliance

The police officers’ reliance on Mr. Bernstein’s consent was not reasonable. A warrantless search that is consented to is constitutional. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

When one person consents to a search of property owned by another, the consent is valid if ‘the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.’

U.S. v. Jenkins, 92 F.3d 430, 436 (6th Cir. 1996) citing Illinois v. Rodriguez, 497 U.S. 177 (1990). The critical facts are how that relationship between the consenter

and owner appears to the officer who asked for consent. Jenkins at 436. It was not reasonable for the police to rely on the consent of the hotel manager in this case.

As discussed above, Mr. Bass had a privacy interest in his hotel room that protected him against a warrantless search and seizure. The government offered no evidentiary support that the police were under the impression that Mr. Bass was evicted. Neither was their support during the evidentiary hearing that the police had reason to believe that the guests were evicted. Mr. Bernstein did not tell Mr. Bass or Mr. Williams that they were evicted. (Tr. at 53). There is no evidence that he informed the police that the guests were evicted. There is no factual support for the officers' reliance on the manager's consent. From the police perspective, there was no indication that either man was evicted from the hotel. Because there was no eviction, or implication of eviction, there was no reasonable reliance.

C. Implied Consent

The government did not provide sufficient evidence to demonstrate that Mr. Bass consented to the search of his room. The government argued that Bass impliedly consented to the search of his room by not verbalizing his objections to the search. The only evidence that the government offered in support of its argument that Bass consented was the testimony of Officer Jenkins. Jenkins testified that Bass stated that he had no interest in the hotel room. (Tr. at 109). After

testifying that he was the only officer who made a police report, Jenkins admitted that the police report did not reflect that Mr. Bass consented to a search. (Tr. at 120). Officer Jenkins testified that Mr. Bass never signed any acknowledgment that he had no interest in the room. (Tr. at 121). Despite there being a number of police officers and hotel staff at the scene with Officer Jenkins, no one else testified that Mr. Bass disavowed his privacy interest in his hotel room. None of the other government witnesses testified that Mr. Bass was silent during the search either, or that the police received consent to search the room. (Tr. at 46; 69; and 83).

Interestingly, the only government witness who testified in support of any type of consent was Officer Jenkins who stated Mr. Bass expressly consented, yet the government argued that Bass consented by silence. (Govt. Resp. at 10). Mr. Bass claims that the police asked if they could search his room and he said “no.” (Tr. at 133). Based on the testimony of the witnesses and the evidence, the Court finds as a factual matter that Mr. Bass was not silent. Thus, Bass did not implicitly consent to the search.

D. Privacy rights in the duffle bag

The government next argues that Bass disclaimed any ownership interest in the duffle bag. The police search of the duffle bag derived from the search of the hotel room. This Court has determined, *supra*, that Mr. Bass was not evicted from

his room. Thus, his privacy interest was intact. This interest was violated by the warrantless search. The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search...” Murray v. U.S., 487 U.S. 533, 536 (1988). The police violated Mr. Bass’s Fourth Amendment rights by searching his hotel room without a warrant. The duffle bag was tangible material seized during the unlawful search. The bag was the fruit of the illegal search.

Further, the government has little evidence in support of the proposition that Mr. Bass denied ownership of the bag. Officer Jenkins testified that Mr. Bass was transported to the room of the hotel without probable cause and he denied ownership of the bag. (Tr. at 114). However, no other government witness testified that Mr. Bass denied ownership in the bag despite the fact that those witnesses all reported being in the same room. In fact, Officer Jenkins identified Officer Kennedy as the person who picked up the bag when Mr. Bass allegedly stated that it was not his. (Tr. At 114). Yet, Officer Kennedy did not testify that Bass denied ownership. Bass contends that he did not deny ownership of the bag. (Tr. at 134). As a factual matter, this Court is not convinced that Mr. Bass denied ownership of the bag. The government’s argument that defendant had no privacy rights in the duffle bag fails as a matter of fact and law.

E. Inevitable Discovery

It was not inevitable that the duffle bag would have been discovered and turned in to the police. The inevitable discovery doctrine states: “...evidence may be admitted if the government can show that the evidence inevitably would have been obtained from lawful sources in the absence of the illegal discovery.” United States v. Leake, 95 F.3d 409, 412 (6th Cir. 1996). This doctrine requires the Court to analyze what would have happened had the unlawful search never occurred. The government contends that because Gerald Bass was arrested, the duffle bag would have been inevitably discovered by the hotel staff, and they would have turned it in to the police given their knowledge of Mr. Bass’s arrest. However, based on the testimony of the government’s witnesses, it was not inevitable that the bag would have been discovered for two reasons. First, the guests could have returned to the hotel before they were evicted and regained the property from the room. Before the search of the room, Gerald Bass was arrested for carrying a concealed weapon. Deandre Williams was arrested for creating a disturbance. (Govt’s Brief at 2). Either of these men could have been released on bond in the subsequent day or two which remained before they had to check out. Officer Kennedy testified that Mr. Williams was released the same day that the police arrested him. (Tr. at 93).

Second, the hotel’s policy regarding forgotten or abandoned items does not comport with the government’s theory of inevitable discovery. The hotel’s policy

was to attempt to contact the guest to inform him, and if unsuccessful, to hold the items left by guests for 90 days, and discard unclaimed items. (Tr. at 51). In this case, if the duffle bag were ever discovered by hotel staff, the hotel would have attempted to contact Mr. Bass or Mr. Williams at the address given on Johnny Brusco's driver's license. Then the hotel would have held the bag for 90 days to be reclaimed. If it was not reclaimed, the bag would have been destroyed pursuant to the Marriot policy alluded to by Mr. Bernstein. The police seizure of the duffle bag is not protected pursuant to the inevitable discovery doctrine, because there is no indication that the bag would have been discovered by the police, if not for the warrantless search. If it were discovered, the hotel would have held and destroyed it.

F. Warrantless Search Analysis

Because Bass had a privacy interest in his hotel room at the time of the warrantless search, and no consent was given to search the premises, the Chicago police's search of the room should be analyzed under the non-consensual warrantless search standard

The Fourth Amendment of the Constitution of the United States protects citizens from unreasonable searches and seizures. "Absent exigent circumstances, police officers may not enter an individual's home or lodging to effect a warrantless

arrest or search.” United States v. Morgan, 743 F.2d 1158, 1161 (6th Cir. 1984), cert. denied, 471 U.S. 1061 (1985). Although there are exigent circumstance which provide an exception to the warrant requirement, warrantless entries and searches are “presumptively unreasonable.” Payton v. New York, 445 U.S. 573, 590 (1980). Exigent circumstance alone is not enough; it must be accompanied by reasonable belief. U.S. v. Lewis, 2000 WL 1643846 *2 (6th Cir. (Ohio)); see also, Pray v. City of Sandusky, 49 F.3d 1154, 1158 (6th Cir. 1995)(holding that warrantless searches of a home are unreasonable unless supported by probable cause and exigent circumstance).

The warrant requirements of the Fourth Amendment have application to searches of motel and hotel rooms as well as private homes. U.S. v. Killebrew, 560 F.2d 729, 733 (6th Cir. 1977). “No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.” Stoner v. California, 376 U.S. 483 (1964) citing Johnson v. United States, 333 U.S. 10; McDonald v. United States, 335 U.S. 451 (1948). The burden of justifying a warrantless entry into a private home or motel room is upon the government.

In this case, no exigent circumstance existed to justify the warrantless search of Gerald Bass’s room, and there was no probable cause to search the room.

Exigent circumstances which constitute the exception to the search warrant requirement include: imminent destruction of evidence, United States v. Delguyd, 452 F.2d 346 (6th Cir. 1976); hot pursuit of a fleeing felon, United States v. Santana, 427 U.S. 38 (1976), and risk of danger to police or others, Minnesota v. Olson, 495 U.S. 91 (1990). The government gave two reasons for searching Bass's hotel room: 1) in order to gather Bass's property and assure him that nothing was stolen; and 2) at the request of hotel staff, to ensure the safety of guests of the hotel. (Govt. Supp. Brief at 4). The government did not argue that the danger to the police or the guests constituted an exigent circumstance. None of the officers testified that they felt that they were at a risk of danger after they arrested Bass and Williams. No police were stationed at the door of Bass's hotel room. (Tr. at 38). Further, the police testified that they went upstairs at the request of hotel staff, because the hotel staff was concerned for the safety of the other guests. (Tr. at 96; 108). The implication of the police testimony is that the police's concern for the safety of the hotel guests was extinguished when Bass and Williams were apprehended. No exigent circumstance existed when the police went up to the room; they were simply fulfilling their community care taker function. (Govt's Supp Brief at 6). Finally, the police admitted that they had no probable cause to enter the room. (Tr. at 95).

V. CONCLUSION

The Court has determined that defendant was a guest of the Chicago Marriot hotel at the time of the police search. Gerald Bass had a privacy interest in his room at the hotel. The police searched Mr. Bass's room without his consent and without a warrant. No exigent circumstance, or probable cause existed to justify the warrantless search. The police did not reasonably rely on the consent to search given by the hotel staff, and the evidence would not have been discovered inevitably.

Based on the pleadings, the evidentiary hearing, and for the reasons stated above:

IT IS ORDERED that defendant's motion to suppress evidence [86-1] is GRANTED;

IT IS FURTHER ORDERED that defendant's motion to suppress fruits of the illegal search [86-2] is GRANTED.

/s/
ARTHUR J. TARNOW
U. S. DISTRICT JUDGE

Dated: November 21, 2000